

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|-----------------------|---|--------------|
| REGENT NATIONAL BANK, | : | CIVIL ACTION |
| | : | |
| Plaintiff, | : | |
| | : | |
| v. | : | No. 96-8615 |
| | : | |
| K-C INSURANCE PREMIUM | : | |
| FINANCE CO., et al., | : | |
| | : | |
| Defendants. | : | |
| | : | |

MEMORANDUM

R.F. KELLY, J.

DECEMBER , 1997

This case arose out of an agreement between the parties to conduct an insurance premium financing business. The Plaintiff brought this action on December 24, 1996 for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961-68, and pendent state law claims. Defendants now move for summary judgment on Counts I and II of Plaintiff's complaint and to dismiss the remaining counts. For the reasons that follow, Defendants' Motions will be granted.

Background

On July 1, 1994, Regent National Bank ("Regent") entered into a Processing, Servicing, Marketing and Consulting Agreement ("Agreement") with K-C Insurance Premium Finance Co. ("K-C") whereby the parties began an automobile insurance premium financing business called Regent Premium Finance ("RPF"). The business would provide loans to people who could not pay their

automobile insurance premiums in large lump sums. The Agreement provided that K-C would manage the day-to-day operations of the business and that Regent would make the loans with its funds. Regent and K-C would then split the profits. Defendant Alvin Chanin was K-C's sole shareholder, and Defendant Antimo Cesaro was recruited to manage the operations of RPF.

By August of 1995, RPF's receivables were approximately \$14.5 million, and Regent's Board had authorized an increase in the loan limits to \$20 million. But the amount of receivables apparently was deceiving, as was revealed by Regent's outside auditors, Arthur Andersen, in the spring of 1996. In its annual audit, Arthur Andersen discovered that Regent's premium finance portfolio contained approximately \$8.6 million in delinquent loans that, after adjustments, would result in an estimated loss to the Plaintiff of \$4.5 million. This loss eventually led to Regent closing down the business in September of 1996.

While the reasons are in dispute, it is uncontroverted that K-C never properly accounted for delinquent accounts and therefore never advised Regent as to what portion of the receivables was uncollectible. This overstatement of profit resulted in K-C submitting reports to Regent indicating that the insurance premium business was financially stable, when in reality it was not.

At a deposition, Matthew Allman, a former employee of

K-C, testified that, on one occasion in 1996, he was directed by Cesaro to misapply funds in order to reduce the outstanding delinquencies that K-C would have to write off as uncollectible. Regent contends that this incident was the culmination of a two-year scheme conducted by the Defendants for the purpose of defrauding the bank. The Defendants contend that, assuming the truthfulness of Allman's testimony, this incident was an isolated instance of fraud, and that any inaccurate reports and mismanagement were the results of negligence, inexperience, or other factors.

Standard

Summary judgment is proper if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party has the burden of informing the court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The non-moving party cannot rest on the pleading, but must go beyond the pleadings and "set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e); Celotex, 477 U.S. at 324. If the court, in viewing all reasonable inferences in favor of the non-moving party, determines that there is no genuine issue of material fact, then summary judgment is proper.

Celotex, 477 U.S. at 322; Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 (3d Cir. 1987).

Discussion

Counts I and II of Plaintiff's complaint state claims for RICO and RICO conspiracy, respectively. The RICO statute creates a private cause of action for any person injured in business or property by a violation of 18 U.S.C. § 1962. See 18 U.S.C. § 1964(c). Section 1962© prohibits any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate in conduct of the enterprise's affairs through a pattern of racketeering activity. A claim for a violation of § 1962© requires five elements: (1) the existence of an enterprise that affects interstate commerce and is separate and distinct from the defendant, (2) the defendant was associated with the enterprise, (3) the defendant conducted or participated in the enterprise's affairs, (4) each defendant engaged in a pattern of racketeering activity, and (5) the racketeering was the proximate cause of injury to the plaintiff. City of Rome v. Glanton, 958 F. Supp. 1026, 1043 (E.D. Pa. 1997).

At issue in this case is the fourth requirement: whether the Defendants engaged in a "pattern of racketeering activity." The RICO statute defines a "pattern" as requiring "at least two acts of racketeering activity" within a ten year

period. 18 U.S.C. 1961(5). This definition has been held to "state a minimum necessary condition for the existence" of a pattern. H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 237 (1989). A pattern requires both that the predicate acts of racketeering are related and that they amount to or pose a threat of continued criminal activity. Id. at 239. The Court defined the relatedness requirement as acts with "the same or similar purposes, results, participants, victims, or methods of commission, or otherwise . . . interrelated by distinguishing characteristics." Id. at 240 (quoting 18 U.S.C. § 3575(e)). Because the participants and victims are identical here, I will proceed on the assumption that the relatedness requirement is met.

The continuity requirement is a temporal concept. It refers either to a closed-ended scheme, consisting of a closed period of repeated conduct, or to an open-ended scheme, in which past conduct by its nature projects into the future with a threat of repetition. H.J. Inc., 492 U.S. at 241. Both parties in this case agree that the alleged scheme here falls into the closed-ended category. In the case of a closed-ended scheme, the plaintiff must prove a series of related predicates lasting a "substantial period of time." Hughes v. Consol-Pennsylvania Coal Co., 945 F.2d 594, 609 (3d Cir. 1991), cert. denied, 504 U.S. 955 (1992). The Third Circuit has consistently held that periods of

less than one year are not substantial for purposes of RICO. Tabas v. Tabas, 47 F.3d 1280, 1293 (3d Cir. 1995), cert. denied, 515 U.S. 1118 (1995); see also Hughes, 945 F.2d at 609 (holding that twelve months is not a substantial period of time under RICO).

Regent must first establish the predicate acts underlying its RICO claim. In this case, the RICO claim is based upon the underlying crime of bank fraud (18 U.S.C. § 1344). Bank fraud requires three elements: (1) a scheme to defraud a federally insured financial institution, (2) the defendant participated in the scheme by means of false pretenses, representations, or promises which were material, and (3) the defendant acted knowingly. United States v. Goldblatt, 813 F.2d 619, 623 (3d Cir. 1987).

To support its allegations of bank fraud, Regent offers the deposition testimony of Allman that on one occasion in 1996, at the direction of Cesaro, he misapplied funds to delinquent accounts in order to make it appear as though the insurance premium business was earning a profit. Regent further argues, based on the deposition testimony of Kristen Evan (an officer of Regent), that, in July and August of 1996, Defendants issued reports to Regent that contained false information. Assuming that these acts meet the requirements of bank fraud, they occurred over, at most, an eight-month span. This is clearly

insufficient to constitute a "pattern" under RICO.

Regent contends that the "pattern" actually began at (or prior to) the time the Agreement was executed between Regent and K-C in July of 1994. Regent contends that the Defendants failed to disclose that K-C's computer system was inadequate for recording income, profits, and other calculations necessary to the business. In support of this allegation, Regent offers the deposition testimony of Thomas Lisowski (an accountant retained by K-C) that, at the time the business began, the computer system was not capable of processing all of the information necessary. (See Pl.'s Resp., Ex. D). Regent further argues that Chanin and Cesaro withheld this information from the Plaintiff. Taking these allegations as true, they do not rise to the level of the predicate act of bank fraud. Plaintiff has offered no evidence of a scheme to defraud Regent, nor is there any evidence that the Defendants acted with the intent to defraud Regent.

Because knowledge that K-C's computer system was inadequate does not constitute a predicate act, the only remaining predicate acts took place during 1996, over, in less than an eight-month period. Thus, the continuity requirement is not met for the Defendants' actions to constitute a pattern under RICO, and summary judgment must be granted in favor of Defendants on Count I.

In the absence of a viable claim under RICO, the

Plaintiff cannot, in Count II, make a RICO conspiracy claim under 18 U.S.C. § 1962(d). Steco, Inc. v. S & T Mfg., Inc., 772 F. Supp. 1495, 1503 (E.D. Pa. 1991). Defendants are therefore also entitled to summary judgment on Count II.

The Defendants have also made a Motion to Dismiss the state law counts of the complaint as there are no federal claims remaining. This Court may decline to exercise supplemental jurisdiction over pendent state law claims when all claims over which this Court had original jurisdiction have been dismissed. 28 U.S.C. § 1367(c)(3). The Plaintiff could then file this action in state court pursuant to 42 Pa. C.S. § 5103(b). Because there are no federal claims remaining, the remainder of the complaint and all counterclaims are dismissed without prejudice.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|-----------------------|---|--------------|
| REGENT NATIONAL BANK, | : | CIVIL ACTION |
| | : | |
| Plaintiff, | : | |
| | : | |
| v. | : | No. 96-8615 |
| | : | |
| K-C INSURANCE PREMIUM | : | |
| FINANCE CO., et al., | : | |
| | : | |
| Defendants. | : | |
| | : | |

ORDER

AND NOW, this day of December, 1997, upon
consideration of Defendants' Motion for Partial Summary Judgment
and Motion to Dismiss Counts III through XI, and all responses
thereto, it is hereby ORDERED that:

1. Defendants' Motion for Partial Summary Judgment is
GRANTED;

2. Defendants' Motion to Dismiss is GRANTED and all
remaining Counts of the Complaint and all Counterclaims are
DISMISSED without prejudice;

3. all other Motions are DENIED as moot;

4. the Clerk of Court is directed to list this case as
CLOSED.

BY THE COURT:

Robert F. Kelly,

J.